

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STERICYCLE, INC.

and

TEAMSTERS LOCAL 628

Cases 04-CA-137660
04-CA-145466
04-CA-158277
04-CA-160621

Lea Alvo-Sadiky, Esq., for the General Counsel.
Charles P. Roberts III, Esq. (Constangy, Brooks, Smith & Prophete LLP),
of Winston-Salem, NC, for the Respondent.
Claiborne S. Newlin, Esq. (Meranze, Katz, Gaudio & Newlin, PC),
of Philadelphia, PA, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. On November 10, 2016, I issued a decision concluding, *inter alia*, that Stericycle, Inc. (the Company) implemented and maintained rules in its 2015 employee handbook relating to personal conduct, conflicts of interest, and confidentiality of harassment complaints in violation of Section 8(a)(1) of the National Labor Relations Act (the Act).¹ On May 8, 2020, the National Labor Relations Board (the Board) remanded the allegations to me for further consideration and issuance of a supplemental decision in accordance with the revised framework for analyzing such rules set forth in *Boeing Co.*, 365 NLRB No. 154 (2017).²

FINDINGS OF FACT³

Stericycle, Inc. (the Company) is the largest medical waste disposal company in the United States. The Company's Morgantown, West Virginia facility collects, processes and disposes of regulated medical waste from hospitals, nursing homes, and medical, dental and veterinary offices. The policies at issue are set forth in an employee handbook that was distributed to the Company's Morgantown employees in February 2016. The rules at issue state, in pertinent part:

¹ 29 U.S.C. §§ 151-169.

² The parties waived the right to reopen the record in order to introduce additional evidence.

³ The General Counsel has since withdrawn and dismissed the complaint allegations regarding the use of personal electronic devices, electronic communications, cameras and videos. With that exception, the findings of fact in my initial decision (JDO 110-16) are incorporated by reference herein.

Personal Conduct Policy

In order to protect everyone's rights and safety, it is the Company's policy to implement certain rules and regulations regarding your behavior as a team member. Conduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination.

The following are some examples of infractions, which could be grounds for corrective action up to and including termination, however this list is not all-inclusive.

- Possession, consumption, distribution or sale of alcohol, drugs or illegal substances while on premises, or reporting to work under the influence of the above mentioned items.
- Carrying or possessing firearms or weapons of any kind on the Company's property or while engaged in Company assignments
- Theft
- Pilfering of waste
- Use of profanity or inappropriate language while on Stericycle premises whether on duty or not.
- Gambling on Stericycle premises
- Acts of violence
- Engaging in behavior which is harmful to Stericycle's reputation
- Falsifying any Stericycle record or report, including but not limited to an application for employment, a time record, a customer record, manifest, invoices, receiving records, etc.
- Willfully defacing, damaging, or unauthorized use of Company property or another team member's property
- Sleeping on the job
- Continued or excessive absenteeism or tardiness
- Violation of safety and/or operating rules
- Smoking or "Vaping" in "No Smoking" areas
- Refusing to follow the directions of a supervisor or otherwise being insubordinate
- Violation of the Sexual Harassment policy
- Failure to punch/swipe in and out when appropriate or punching in/out for other team members

Conflicts of Interest

Stericycle will not retain a team member who directly or indirectly engages in the following:

- An activity that constitutes a conflict of interest or adversely reflects upon the

integrity of the Company or its management.

-- An activity in which a team member obtains financial gain due to his/her association with the Company.

-- An activity, which by its nature, detracts from the ability of the team member to fulfill his/her obligation to the Company.

Confidentiality of Harassment Complaints

The employee handbook contained a detailed policy prohibiting harassment of all types, including, but not limited to, sexual harassment. In a separate section, entitled "Retaliation," the handbook provided:

Stericycle strictly prohibits unlawful retaliation against any team member or applicant for employment who reports discrimination or harassment, or who participates in good faith in any investigation of unlawful discrimination or harassment.

What action should you take if you feel you have been a victim of harassment or retaliation?

If you believe you have been the victim of harassment or retaliation of any kind, immediately do the following:

1. If you feel comfortable doing so, we encourage you to tell the person in no uncertain terms to stop; and

2. Report the incident and the name of the individual(s) involved to your Human Resources Representative. If you cannot report the issue to your Human Resources Representative for any reason, contact the Team Member Help Line at [Phone Number]. The Help Line accepts anonymous complaints of any kind.

All complaints will be promptly investigated. All parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable.

ANALYSIS

In *Boeing Co.*, 365 NLRB No. 154 (2017), the Board established a new standard for determining whether a facially neutral employer policy, reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. This decision overruled *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which held that a facially neutral work rule would be found unlawful if employees would reasonably construe it to prohibit Section 7 activity. *Id.* at 647. Specifically, the Board held that, when analyzing a facially neutral policy, rule or handbook provision that would potentially interfere with the exercise of rights under the Act, it will evaluate two things: (i) the nature and extent of

the potential impact on rights under the Act, and (ii) legitimate justifications associated with the rule. *Boeing*, 365 NLRB No. 154, slip op. at 3. In conducting this evaluation, the Board seeks to balance the employer's asserted business justifications for the policy and the extent to which the policy interferes with employee rights under the Act.

The Board also announced that it would evaluate the work rules based on one of three categories: Category 1 – lawful rules, as reasonably interpreted, that do not prohibit or interfere with the exercise of protected rights or the potential adverse impact on protected rights is outweighed by business justifications; Category 2 – rules warranting individualized scrutiny as to whether they would prohibit or interfere with protected rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate justifications; and Category 3 – rules that unlawfully prohibit or limit protected conduct, which impact is not outweighed by business justifications. *Id.* at 3-4.

A. Personal Conduct and Conflict of Interest Policies

The complaint alleges that the Company's Personal Conduct and Conflict of Interest Policies, both of which prohibit conduct that is harmful to the Company's reputation or integrity, violate Section 8(a)(1) of the Act by unlawfully restricting employee conduct with no substantial business justifications. The Company contends that the policies are lawful and any restrictions on employee conduct are outweighed by substantial business justifications.

An employer violates Section 8(a)(1) of the Act when it interferes with or restrains employees' Section 7 rights. The Board has long held that "employees have a right to discuss among themselves, and with the public, information about their terms and conditions of employment for the purpose of mutual aid and protection." *Motor City Pawn Brokers*, 369 NLRB No. 132, slip op. at 6 (2020) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978)). On the other hand, the Board has decisively categorized policies prohibiting employee communication with customers and third parties in a way that disparages the company as lawful. *Id.* at 9.

In *Motor City Pawn Brokers*, the Board determined that this type of policy falls into *Boeing* category 1(b), because the potential adverse impact on Section 7 rights is outweighed by significant business justifications and legitimate interest in maintaining a positive reputation with customers and the general public. *Id.* The Respondent relies on *Motor City Pawn Brokers* as dispositive because the policies analyzed there were indistinguishable with those at issue here. *Motor City Pawn Brokers* is not dispositive, however, because the sanctioned policies in that case encompassed only employee communications with customers and third parties, and the business justification cited emphasized the impact on third parties.

The policies at issue here have a much broader reach. They prohibit "conduct that maliciously harms or intends to harm the business reputation of Stericycle," "behavior which is harmful to Stericycle's reputation," and "an activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management." Such language could reasonably be read to include communications with not only third parties and customers, but also with and among employees.

The Board has distinguished between policies prohibiting disparaging statements made to third parties, which are lawful, and those prohibiting disparaging statements among employees, which unlawfully infringe on Section 7 rights. See *Union Tank Car Co.*, 369 NLRB No. 120, slip op. at 2-3 (July 17, 2020) (finding prohibition on disparaging communications among employees to be unlawful). The policies at issue here are broad and do not specify whether they apply to statements between employees or customers and third parties. Because the policies are so broad, they could be reasonably interpreted to prohibit communications among employees regarding the terms and conditions of their employment, thus interfering with core Section 7 activity. These policies also embrace conduct, rather than just communications, that is harmful to the Company's reputation. Such a restriction could reasonably be interpreted to include other protected activities such as participating in a strike or some other form of protest of working conditions.

In contrast with the business considerations that attach to policies prohibiting disparaging statements to customers and third parties, none have been shown to exist with respect to policies infringing on protected communication among employees. Moreover, the Company's policies stress that the failure to comply could result in termination. Such adverse consequences impose a chilling effect on employees' Section 7 rights, with no substantial business justifications. As the Board held in *Union Tank Car Co.*, there is no business justification that would outweigh an infringement of this nature on such core Section 7 rights. *Id.*

The Respondent contends that its Conflict of Interest Policy is reasonably understood to encompass business and financial activities that typically constitute a conflict of interest, rather than all outside activity. Read isolated, this is a reasonable interpretation; a "conflict of interest" in a business environment is reasonably understood to involve some form of additional employment or involvement outside of work that would create a concern of competing commitments.

The Respondent relies on *G & E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank*, 369 NLRB No. 121 (2020) as dispositive because it concerned a conflict of interest policy which the Board found to be lawful. Read as a whole, however, the provision at issue here is substantially different. The *Newmark* policy specifically applied to outside employment and other business activities. It also listed several examples of proscribed activities (outside employment, consulting, serving on boards, and making non-passive investments). *Id.* The Conflict of Interest policy here is much broader and does not make any of these specifications, so *Newmark* cannot be dispositive.

As reasonably interpreted, the Respondent's Personal Conduct and Conflict of Interest Policies violate Section 8(a)(1) of the Act.

B. Confidentiality of Harassment Complaints

The Board has consistently held that confidentiality policies limited to the duration of an open investigation also fall into *Boeing* Category 1(b) because they infringe on employees' rights, but that infringement is outweighed by the substantial business justifications. *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144, slip op. at 11 (2019) (holding that the employer has a substantial interest in maintaining a fair investigation, encouraging employees to

come forward with allegations, and protect employees from retaliation or repercussions); *Caesar's Palace*, 336 NLRB 271, 272 (2001) (Board upheld a confidentiality policy applied to ongoing investigation of alleged drug activity in workplace). In contrast, when investigative confidentiality rules are not limited to the duration of an investigation, they fall into *Boeing* Category 2, requiring a weighing of the business justifications with the potential impact on employees' Section 7 rights. *Apogee Retail LLC*, supra at 13.

The rule at issue, which requires that "[a]ll parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable," can be reasonably interpreted to extend past the period of open investigation and has no clear time limit. The Board has long recognized that the right of employees to discuss, at the very least among themselves, the details of a workplace investigation is a protected Section 7 right. See *Phoenix Transit System*, 337 NLRB 510, 511 (2002) (finding rule which prohibited discussion of resolution of employee complaint to be unlawful). The business justifications for confidentiality during an investigation in *Apogee* – protecting evidence and maintaining the integrity of the investigation – become irrelevant once an investigation concludes. At that point, the only remaining rationale pertains to the protection of witnesses and victims from retaliation.

The policy requires confidentiality "to the fullest extent practicable." As reasonably interpreted, the policy is simply too vague. Employees may reasonably construe the policy to prohibit them from discussing the events that prompted a complaint and the actions taken by the company in response. Such an interpretation could severely limit their options for recourse and prevent them from speaking out when the company does not satisfactorily respond to a complaint. It also can be reasonably construed to preclude communications with union representatives, for which there is no legitimate business justification.

The policy does not impose a punishment if confidentiality is not maintained. That omission, however, does not render the chilling effect on employees' protected communications negligible. Since the rule appears in an employee handbook along with other rules that are punishable, it is reasonable for an employee to believe that there may be adverse consequences if they fail to maintain confidentiality.

The Equal Employment Opportunity Commission's (EEOC) guidance on "Vicarious Liability for Unlawful Harassment by Supervisors" does not produce a different result. That advisory stresses the importance of an employer's duty to maintain the confidentiality of victims and witnesses of harassment to ensure that employees are comfortable speaking up. It does not even remotely suggest, however, that employees who file such complaints should also be bound to bury their concerns in perpetuity. The flip side, of course, is that an employee who chooses to confer with other employees about their complaints after an investigation has concluded assumes the risk of retaliation. The duty, according to the EEOC, extends to the employer, not the employee.

As reasonably interpreted, the Company's policy classifying harassment complaints as confidential is excessively and unjustifiably broad with the potential to infringe upon protected communications between employees after an investigation concludes. Accordingly, that policy also violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Stericycle, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local 628 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since September 1, 2006, the Union has been the exclusive collective-bargaining representative of the following unit of employees at its Southampton facility (the Southampton unit), which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers, driver techs, in house techs, helpers, dockworkers and long haul drivers of the Company at its Southampton, Pennsylvania location; but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

4. At all times since September 1, 2011, the Union has been the exclusive collective-bargaining representative of the following unit of employees at its Morgantown facility (the Morgantown unit), which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time regulated medical waste (RMW) plant workers, sharps plan workers, RMW Shift Supervisors, Sharps Shift Supervisors/quality control representatives, drivers, dispatchers, yard jockey, maintenance mechanics, Maintenance Supervisor and painters employed by Respondent at its Morgantown, Pennsylvania facility; but excluding all office employees, confidential employees, guards and supervisors as defined in the Act.

5. The Respondent failed to provide the Union with an opportunity to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by making unilateral changes to Morgantown facility employees' terms and conditions of employment by implementing an employee handbook in February 2015.

6. The Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by refusing the Union's requests on September 11 and 26, 2014, for a copy of information concerning the Respondent's recoupment of employee healthcare deductions from Southampton unit employees.

7. The Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by refusing the Union's request on September 5 and 18, 2014, for a copy of the Respondent's internal communications, meeting notes and bargaining documents relating to the Union's grievance over the 401(k) provision in the Southampton unit employees' collective-bargaining agreement.

8. The Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by refusing the Union's request on November 13 and 18, and December 1, 2014 for a copy of the Respondent's EBOLA training provided to Morgantown unit employees.

9. The Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by refusing or failing to provide the Union with a copy of the Morgantown employee handbook then in effect and requested by the Union on December 1, 2014.

10. The Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by unreasonably delaying in providing the Union with information it requested on November 24, 2014 about the Vehicle Backing Program.

11. The Respondent failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by refusing to provide the Union with a copy of the Code of Conduct and Harassment Training video shown to Morgantown unit employee.

12. The Respondent violated Section 8(a)(1) of the Act by maintaining a personal conduct work rule at page 30 of the Team Member Handbook which could be understood to prohibit employees from engaging in activities protected under Section 7 of the Act and states, in pertinent part, that "[c]onduct that maliciously harms or intends to harm the business reputation of Stericycle will not be tolerated. You are expected to conduct yourself and behave in a manner conducive to efficient operations. Failure to conduct yourself in an appropriate manner can lead to corrective action up to and including termination . . . Engaging in behavior that is harmful to Stericycle's reputation."

13. The Respondent violated Section 8(a)(1) of the Act by maintaining a conflict of interest work rule at page 33 of the Team Member Handbook which could be understood to prohibit employees from engaging in activities protected under Section 7 of the Act and states, in pertinent part, that "Stericycle will not retain a team member who directly or indirectly engages in the following: . . . An activity that constitutes a conflict of interest or adversely reflects upon the integrity of the Company or its management."

14. The Respondent violated Section 8(a)(1) of the Act by maintaining a retaliation work rule at page 10 of the Team Member Handbook which could be understood to prohibit employees from engaging in activities protected under Section 7 of the Act and states, in pertinent part, that "[a]ll parties involved in the investigation will keep complaints and the terms of their resolution confidential to the fullest extent practicable."

15. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

16. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate

the policies of the Act. Moreover, as one or more of the challenged policies have been determined to be overly broad and violate Section 8(a)(1), a nationwide posting by the Company is appropriate since the record establishes that the unlawful rules or policies are maintained or in effect at all of the Company's facilities within the United States. See *Mastec Advance Technologies*, 357 NLRB 103 (2011), enfd. sub nom. *DIRECTV v. NLRB*, 847 F.3d 25 (D.C. Cir. 2016), cert. denied, 2017 U.S. LEXIS 5318; *Guardsmark, LLC*, 344 NLRB 809, 812 (2005).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Stericycle, Inc., Morgantown and Southampton, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Teamsters Local 628 (the Union) as the exclusive representative of employees in the following appropriate unit at the Respondent's Southampton facility:

All full-time and regular part-time drivers, driver techs, in house techs, helpers, dockworkers and long-haul drivers of the Company at its Southampton, Pennsylvania location; but excluding all other employees, office clerical employees, guards, and supervisors as defined in the Act.

(b) Refusing to bargain in good faith with the Teamsters Local 628 (the Union) as the exclusive representative of employees in the following appropriate unit at the Respondent's Morgantown facility:

All full-time and regular part-time regulated medical waste (RMW) plant workers, sharps plan workers, RMW Shift Supervisors, Sharps Shift Supervisors/quality control representatives, drivers, dispatchers, yard jockey, maintenance mechanics, Maintenance Supervisor and painters employed by Respondent at its Morgantown, Pennsylvania facility; but excluding all office employees, confidential employees, guards and supervisors as defined in the Act.

(c) Refusing to bargain collectively with the Union by distributing a Team Member Handbook to bargaining unit employees that unilaterally changes their terms and conditions of employment.

(d) Unreasonably delaying in providing the Union with information that is relevant and necessary to its role as unit employees' bargaining representative.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Refusing to provide the Union with requested information that is relevant and necessary to its role as unit employees' bargaining representative.

5 (f) Maintaining a personal conduct rule in the Team Member Handbook that prohibits unit employees from engaging in conduct that maliciously harms or intends to harm the Respondent's business reputation, expects employees to conduct themselves and behave in a manner conducive to efficient operations, threatens employees with corrective action including termination for failing to conduct themselves in an appropriate manner or engaging in behavior that is harmful to the
10 Respondent's reputation.

(g) Maintaining a work rule in the Team Member Handbook prohibiting conflicts of interest that threatens adverse action if an employee directly or indirectly engages in an activity that adversely reflects upon the integrity of the Company or its management.
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(h) Maintaining a retaliation work rule that requires unit employees involved in harassment investigations to keep harassment complaints and the terms of their resolution confidential to the fullest extent practicable.

20 (i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

25 (a) Rescind the entire Team Member Handbook provided to Morgantown bargaining unit employees that unilaterally changed their terms and conditions of employment.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of Southampton and Morgantown unit employees, notify and on request, bargain with
30 the Union as their exclusive bargaining representative.

(c) Provide the Union with the vehicle backing program information it requested on November 24, 2014.

35 (d) Provide the Union with information it requested on September 5 and 18, 2014, regarding the Respondent's internal communications, meeting notes and bargaining documents relating to the Union's grievance over the 401(k) provision in the Southampton unit employees' collective-bargaining agreement.

40 (e) Provide the Union with the information it requested on November 13 and 18, and December 1, 2014, regarding the Respondent's EBOLA training provided to Morgantown unit employees.

45 (f) Provide the Union with the information it requested on December 1, 2014, regarding the Morgantown facility employee handbook then in effect.

(g) Provide the Union with the information it requested on December 30, 2014, regarding Code of Conduct and Harassment Training provided to employees.

(h) Within 14 days after service by the Region, post at its facilities in Morgantown and Southamptton, Pennsylvania, copies of the attached notice marked "Appendix A and at all of its facilities within the United States and its territories, copies of Appendix B."⁵ Copies of the notices, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 5, 2014.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 4, 2020



Michael A. Rosas
Administrative Law Judge

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."